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## MUNICIPALITY AS ACTING IN A GOVERNMENTAL CAPACITY IN CLEANING ITS STREETS.

The Supreme Court of Georgia lately has decided, that a private person injured by the negligence of an employe of a city in the cleaning of its streets cannot enforce liability, for the reason that the city was performing a governmental duty in the preservation of the health of its inhabitants. City of Savannah v. Jordan, 83 S. E. 109.

This court goes upon the theory that there are certain legislative duties that are imposed on municipalities for the benefit of the public, and there are corporate privileges and powers which it exercises for its private advantage, in which exercise the public merely derives a benefit as being properly discharged. For negligence as to the duties there is not, while as to the powers there is, liability for negligence.

Street cleaning, no doubt, is necessary in the preservation of health, but so is the securing of proper drainage, the building and maintenance of proper sewers, and the supply of proper drinking water. Even it might be urged that the control of streets so far as keeping them open at all times to the public for travel—as well as its sidewalks—was a duty in the public interest as distinguished from a privilege or power.

As our esteemed contemporary, New York Journal, says, in reference to the Jordan case: "The truth is that plausible arguments can be made on both sides of the question whether almost any function discharged by a municipality is governmental or merely administrative. The exposition of the distinction between governmental and administrative functions is about as conventional and of as little real utility as the explanation of police power contained in multitudinous judicial opinions. * * * The practical tendency is, as illustrated by the principal case, to exempt municipalities from any liability for their tortious acts."

The Georgia case confines itself closely to the necessities of the case at bar, instancing that here the city was empowered to create a board of health, but independently of such creation, it was its duty "to remove from the streets all the sweepings and garbage and whatever would contaminate the atmosphere and breed pestilence and disease."

The same argument would apply to sewage or to the supplying its inhabitants with abundant, wholesome water, all of which calls for judicial recognition by courts of conditions that result from the crowding of population together in cities, causing legislation vesting cities with authority to act in regard thereto.

It is, however, a great departure from the cases which hold to exemption from liability only for the enforcement of ordinances for peace and order, such as through the police of a city. Much though might be said in favor of the policy of extending immunity to liability for negligence by a city in the doing of everything which has a tendency to preserve the public health, just as the public peace is preserved. Then we might inquire whether the same rule might obtain as to preserving public morality, and, if so, it is not difficult to deduce the conclusion that light has such an intimate relation to morality and the detection and suppression of crime, that acts of negligence in maintenance and conduct of street lighting do not subject a municipality to liability.

A Michigan case seems to indicate a view of this kind by holding a village liable for negligence where it maintained an electric light plant *both* for commercial and municipal purposes. Sykes v. Village of Portland, 143 N. W. 326.

And the Supreme Court of Oregon distinguishes in the same way as to a water works plant, which is intended to be oper-

ated as well for municipal purposes as for private profit. Pacific Paper Co. v. City of Portland, 135 Pac. 871; Blake-McFall Co. v. Same, id. 873. And in street improvement a city is held not liable by this court for consequential injuries in an ordinarily careful adminstration of a prudent plan therefor, but in the building thereof it is liable for negligence. Warren v. City of Astoria, 135 Pac. 527. We think this court is doing an abundance of distinguishing.

As illustrating further how greatly fruitful is this subject of distinctions, in New York Court of Appeals, a municipality was held by four of six judges to be liable for acts of negligence causing injury to a private person, committed by employes in its street cleaning department, there being a strong dissenting opinion by one judge, concurred in by another. Missano v. New York, 160 N. Y. 123, 54 N. E. 744.

The supreme court of that state, in appellate division, argues out the matter very thoroughly, saying that while it is true that a city is not liable for the action of its health authorities in protecting the public health, yet says this does not apply to abating or preventing the creation or occurrence of nuisances. For the mere keeping of premises free from nuisances, this is a duty resting upon the occupant of the street. Quill v. New York, 55 N. Y. Supp. 889, 36 N. Y. App. Div. 476.

We must confess we do not greatly believe in this refinement. The city is only an occupant of a street to clean it or as furnishing facilities of travel to its inhabitants. When it cleans it is preventing the occurrence of a nuisance, and when it is not cleaning it, it is not directly occupying the street at all.

It seems strange, however, that a question like this should be as much in the air as it seems to be. The growth of the distinctions we speak of and the variety of opinion on the subject arise out of a sort of effort by the courts to represent something they conceive to be demanded in evolution of law so called, but they are but development of ideas along some judges' views of the demands of the age. We would say, therefore, that revolution, rather than evolution, more fitly would describe these rulings.

## NOTES OF IMPORTANT DECISIONS

**MUNICIPAL CORPORATIONS—LIABILITY FOR DESTRUCTION OF PROPERTY BY A MOB.—The Kentucky statute makes a city liable for destruction of property by mob violence provided that its authorities have notice or good reason to believe that a mob is about to assemble or has assembled in time to prevent by their own force or by the aid of its citizens such destruction, and that no one unlawfully contributing by word or deed toward exciting or inflaming tumult or riot, or not reasonably doing what he can to preventing or allaying such tumult or riot, shall have an action against such city. Tandy v. City of Hopkinsville, 169 S. W. 703.**

**In this case it was abundantly shown that the city did not have such notice as would have enabled it to protect the destroyed property involved in the suit, but the court charged the jury, among other things, that if they believe from the evidence "that the plaintiff unlawfully contributed by word or deed toward inciting or inflaming such tumult or riot, or that he failed to do what he reasonably could toward preventing, allaying or suppressing it, they should find for defendant."**

**The objection urged was that there was no evidence to support such an instruction. The plaintiff rented the destroyed property to independent dealers in tobacco and the Night Riders here engaged in raids or destruction of such property, and he did not employ guards to protect his property.**

**The court said: "Clearly the plaintiff had the lawful right to rent his property for lawful purposes to whom he pleased and for what purposes he pleased, and it is not to be tolerated that these lawful acts of a citizen are to be tortured into a contribution towards exciting or aggravating the vicious qualities of a mob, who might believe that a citizen did not have the right to make legal use of his property if it ran counter to their desires." It was further said he did not have to employ guards to protect his property. "The statute subject**

to specified conditions impose upon the city a liability and this liability it can escape only by performing its duty as described in the statute."

This statute gives to property owners certain rights, but it requires of them certain watchfulness, if they are aware of conditions threatening its destruction. It is too broad to declare, as a legal principle, that owners of property thus threatened should not exercise extraordinary precautions. For example, while as a general rule, a man may do with his property as he pleases, provided he creates no nuisance nor interferes with the lawful rights of others. We greatly doubt, however, whether he may have as full liberty to rent it for lawful purposes in anticipation of his act in renting it making it liable to destruction by a mob, or that having rented it not in such anticipation he may leave it unguarded. A mob may be like vis major, and the purpose of the statute is to make a city resist a superior force. The condition is that the property owner advisedly shall not by act of omission or commission bring destruction upon his property whether by an act ordinarily lawful or not. The proviso in the act contemplates that a property owner must abate something from the lawful exercise of his rights where there is a state somewhat akin to war or rebellion. The court, however, did not reverse the case, because in view of the strong testimony of the city having no notice, it thought the error not so prejudicial as to demand reversal.

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STARE-DECISIS—RULE DOES NOT APPLY TO ADVISORY OPINIONS.—In Massachusetts and in one or two other states the Legislature may call upon its supreme court judges in advance of enactment of legislation as to its constitutionality. This was done in Massachusetts as to a proposed workmen's compensation act and the legislature was advised that such a law would be constitutional. It having been enacted, its constitutionality was challenged.

The court in overruling the contention alluded to advisory opinion as follows: "This opinion was advisory in character, given by the justices as individuals, without the benefit of argument, and was not an adjudication by the court, and the rule of stare decisis does not apply to it. (Citing cases.) Therefore the ground is re-examined in the light of the argument now presented, without reliance upon the earlier opinion of the justices and with the effort carefully to guard against any influence flowing from our previous consideration."

This re-examination led the court to the same conclusion as that announced in the advisory opinion. We see, however, no harm in the "advisory opinion" theory, for a judge is not chosen on the idea that he has no prior knowledge regarding questions of law coming before him, but, on the contrary, the more completely he may be "biased" by such knowledge, the better prepared is he supposed to be to decide questions argued to him.

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CONSTITUTIONAL LAW—BLUE SKY LAW OF IOWA AS TO STOCKS, BONDS, ETC. ISSUED IN SISTER STATE.—A circuit judge and two district judges sitting in district court, Central Division of Northern District of Iowa lately have handed down a per curiam opinion holding that the "Blue Sky" law of that state is unconstitutional as against the commerce clause, when applied to a non-resident selling within the state stocks, bonds, or other securities, without complying with said law, and obtaining permit to sell. Compton & Co. v. Allen, 216 Fed. 537.

A question of this importance, involving as it did the constitutionality of a state law would seem to have been entitled to more careful treatment than it received from an inferior court before it overruled a presumption of validity.

Reference is made to only three cases by the Supreme Court, viz.: Nathan v. Louisiana, 8. How. 73; Paul v. Virginia, 8 Wall. 168; Lottery Cases, 188 U. S. 321. The first of these cases held that foreign bills of exchange were not subjects of interstate commerce, the second that insurance was without its pale and in the third a divided cour held that lottery tickets sent by mail from one state to another came under the commerce clause, four justices dissenting.

This per curiam opinion urges that the dissenting opinion makes it clear that "negotiable securities, corporate shares, promissory notes, corporate and municipal bonds, absolute in form, are the subjects of interstate commerce," and it quotes from Justice Harlan as showing this clarity as follows: "What is the import of 'commerce' as used in the constitution? Undoubtedly the carrying from one state to another by independent carriers of things or commodities that are ordinarily subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce."

Considering the positive ruling by the Supreme Court that a foreign bill of exchange was not the subject of interstate commerce, there seems something desired to the conclusion drawn from this language, general and argumentative, when used in a dissenting opinion. We should be permitted very gravely to

doubt, that Justice Harlan meant to declare that the Nathan case was not good law, and we might wonder that this per curiam opinion says: "We have no doubt, but that (Supreme) Court, when presented with the question, will declare such securities and property rights, negotiable and otherwise, as are sought to be regulated by the act in question, are proper subjects of interstate commerce."

We would suggest, in the meantime, that this court should not destroy the validity of a state statute in any other way than by construing decision as rendered by the supreme court rather than by prophesying its future course, in the face of such decision. At the present time these judges knew that a negotiable foreign bill of exchange is not property as being the subject of interstate commerce, and they should not overrule that case, but should try to distinguish it from rights in a bond and a certificate of stock. We know also, that a right in or against property is not property itself under the commerce clause. A bond or a certificate for stock may be transferred by indorsement, and shipment to another is by no means necessary. It is an intellectual, and not a physical act that effects change of ownership, though a physical act may be required as expressive of intent. This, however, is but evidentiary.

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INSURANCE—EQUALITY OF BURDEN THE RULE IN ASSESSMENT COMPANIES. —A mutual hail and cyclone insurance company, organized under Minnesota statute, by its by-laws provided that: "Each member shall be liable for his pro rata share of all losses and expenses," and the statute said: "Every policy holder shall be liable to a ratable assessment for all losess * * * incurred while a member," and further assessments for losses and expenses are to be made "ratably upon its members liable thereto."

The question arose whether it was lawful to divide the state into two districts and levy assessments according to the greater and lesser hazard in the two and Minnesota Supreme Court held that this could not be done. Minnesota Farmers' Mutual Ins. Co. v. Landkammer, 148 N. W. 305.

In the ruling, it was said that: "Neither the statute nor the by-laws recognize a difference in the hazard as a reason for making a difference in the assessment," and "whether sufficient reasons exist for applying different rates to different localities is a question for the legislature."

It is this kind of construction that brings up the scriptural injunction that "the letter killeth, but the spirit giveth life." The law is interested in those companies only in so far as they place an equal burden upon members. It does not expressly say that members shall not be classified or property classified and the words "pro rata," "ratable," and "ratably" do not expressly fix the basis of rates, and there is no policy to be subserved in making one whose risk is less pay as high a rate as one whose risk is greater. Certainly the assessment is not the same *per capita* without respect to amount insured, and it is not expressly said the rate as to amount insured shall be uniform. And then, too, it is easy to imagine that the damage from hail or cyclone might be deemed greater as to one class of property than another. If so, why not in different localities and surroundings?

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## LEGAL QUESTIONS RAISED BY THE EUROPEAN WAR — SOLDIERS' WILLS.

The European war has revived many things which were thought to have been laid past in the lumber room, and one of these is the rule of law which puts the wills of soldiers in a privileged position. Law students noted the doctrine as of academic interest and practitioners had nearly quite forgotten it, but now on every barracks or depot wall there is posted a notice directing the soldiers to deposit their wills with a specified official, and later some of these documents, pathetic in form, contents and circumstances, will come before the courts for probate and confirmation.

The privileges attached to a soldier's will originated, it is said, in the legions of Julius Caesar. One cannot be certain as to that, but that they sprung out of the Roman law is generally accepted by legal historians. The Romans required the observance of numerous solemnities in the making of wills, far more than English law requires, but all this red tape was dispensed with as regards the wills of soldiers *in expeditione*, that is when they were on active service as Caesar's legions

were in Gaul or the British expeditionary force is in Belgium.

The Roman soldier's will was held valid though made when he was under age; though not written, if sufficiently proved by witnesses; and though devoid of all formalities. In British law these same rules have obtained and in the course of time have been amplified, as a few illustrations now given will show.

It is obvious that the oral will gives scope for much deception and hence its practical abolition in the case of civilians, by the law requiring writing and the subscription of the testator, but a good illustration of the exception made in the case of a soldier was an oral will made by a private in a Lancer regiment in South Africa during the South African war. It consisted of a note taken down in writing of a verbal declaration made by the deceased. The comanding officer had directed squadron officers to ascertain the names of the next of kin of all men under their commands or the person to whom each man desired his effects to be sent in the event of his death. The deceased had stated that in the event of his death in South Africa he desired all his effects to go to his sister. Sir Francis Jeune held that the squadron officer's note to that effect was a will and he accordingly granted letters of administration on it.

Then a mere letter to a friend may, in the case of a soldier, get the status of a will. Thus a private stationed at Fort William in Calcutta wrote a letter to his friend telling him that he was just off to South Africa for the Boer war, and went on, "I am sending a box of things to you which I want you to look after for me till I come home. They are a lot of curios, and there are some things for you there, but if you have a letter to say I am killed, the lot is for you." That letter the court held amounted to a testamentary disposition.

In that case the letter was signed but subscription is not essential in the case of a soldier's will, and there are several cases of memoranda in note books, writings on fly-leaves of Bibles, pencil jottings, and so on, all of them unsigned, being given effect to as wills.

Now it is plain that however justifiable it may be to allow all this looseness in the case of soldiers, it opens a wide door to abuse, irregularity and even deliberate fraud, and therefore the Roman authorities wisely limited the privileges to soldiers on actual military service, some authorities say that the words "in expeditione" imply an even stricted limitation and that the soldier must have been on a definite expedition.

Our courts, while adhering to the general rule of the Roman law, have differed as to what the condition referred to exactly meant. In some cases it has been held that a soldier sent abroad to a foreign station in time of peace is on actual military service, and one judge held the doctrine applicable to any soldier in the *regular* army, as opposed to volunteer forces. On the other hand, the privilege was refused in the case of an officer who had left England to take over a command in the Indian army, and died in Mysore, and that even though he was actively discharging the duties of his command, and was at any moment liable to be called upon to march with his division to whatever point the exigencies of a native war, then being carried on in India, might require. Yet, apparently, as he had not gone on any actual military expedition the court refused to recognize him as a soldier on actual military service. That case has not been overturned, but it may be taken for granted that it is too strict and savors too much of the pedantic to be now acceptable.

In view of these conflicting cases, Sir Francis Jeune, when the Boer war cases

came before him, attempted to formulate a rule that would be generally acceptable. In his opinion two things were essential in order to bestow on oral bequests or informal writings the privileges of a soldier's will. First, a state of war must exist and second, some active step should be taken by the testator towards joining the forces in the field and such step might be a small one both as regards time and place. "I should imagine for instance," said his lordship, "that a man lying at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defense, would have been within the meaning of the term *in expeditione.*"

Applying in conclusion the foregoing to present circumstances the privileges referred to will undoubtedly extend to all men in the Expeditionary Force in this war or who may be drafted away in connection with it. But is it confined to them? Are the rest of the regular army and the territorial and other troops excluded? Very difficult questions may arise on this point. It is said in some quarters that everyone who is doing military work at the present moment is on actual military service, but if, as has been already done, the court apply the Roman restriction of *in expeditione* that view is too sweeping.

My own opinion is that the reason for the Roman rule was that the soldier was in a foreign country where facilities for will-making were not available, and the danger and circumstances in which he was placed did not favor elaborate consideration and deliberation, but that when the soldier returned to his own country the necessity for giving him any special privileges ceased. Similarly in the present case, any man who is not sent out of the United Kingdom has plenty time, opportunity and facilities to put right his affairs in proper form and therefore should, as regards that particular duty, be in the same position as other British subjects in the United Kingdom.

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## SOME SUGGESTIONS CONCERNING THE "TITLE TO LANDS UNDER FRESH WATER LAKES AND PONDS."

This subject was treated in earlier volumes of this Journal. The discussion was opened in an instructive manner by the late Judge Thomas M. Cooley.[1]

Two articles by the present writer also bore upon the general subject.[2]

It would have been supposed that maturely considered decisions of the Supreme Court of the U. S. determining the effect of grants under congressional authority of parts of the public domain in states in which the common law prevailed as it did in the territory Northwest of the Ohio when such states formed therein were admitted into the union, would have been determinative, not only in that tribunal, but also and rightfully, in the state courts respectively. There can be no doubt that when the constructions of patents from the U. S. in respect to the boundaries of tracts surveyed and patented as bordering on small non-navigable lakes came under consideration in our highest federal tribunal great care was taken to apply the common law. Nor can it be doubted that the common law was sufficient and controlling. In two cases[3] the court considered fully and critically the question whether the meander as reported in the government survey and plat, should be taken as a boundary. The common law was considered applicable, because it had been adopted as the law of the place. It had, in fact, been adopted

(1) 13 Cent. L. J., 1.
(2) 32 Cent. L. J., 291; Id., vol. 56, p. 344.
(3) Hardin v. Jordan, 140 U. S., 371; Mitchell v. Smale, Id., 406.

by statute in Virginia before the cession of the territory by that state to the United States, and was in force when the U. S. held the property.

The court, upon full and careful consideration, found that the common law was as to grants under congressional authority controlling in respect to boundaries of lands situated on lakes in such territory when the grants made no reservation or restriction. It was stated by the court "that the common law is the true and only law of Illinois on the subject of . . . the rights of riparian owners, and the construction of . . . grants of land bounded by streams and permanent bodies of waters." A great navigable lake, such as Lake Michigan was considered as being in a class different from the non-navigable lakes, even when these were meandered. Hence the sale by the U. S. of all the congressional subdivisions bounding a non-navigable lake carried title to the center of the lake and left no authority for a further subdivision or sale of the lake bed.

Surely, too, that court is the ultimate and highest authority in construing grants made under congressional authority over the public lands. Yet, it will be seen later on, that the court yielded in an important particular to a state court when asked to adhere to its own well advised decisions, on the subject of the treatment of the rights of proprietors having lands bounded by a non-navigable lake.

After the decisions in Hardin v. Jordan, *supra*, and Mitchell v. Smale, *supra*, a hearing was had in the circuit court of Cook County, Illinois, upon certain petitions under the Burnt Records Act, so called. The case involved the title to the same property and lake bed with reference to which said cases in the Supreme Court of the U. S. applied. The title in a measure as to the same and some additional tracts bounded by the lake required consideration. All parties interested had been brought into the case, including the plaintiff in error in Hardin v. Jordan, *supra*, and the grantee of the plaintiff in error in Mitchell v. Smale, *supra*, and the whole matter was very carefully considered by Hon. Murray F. Tuley, the judge presiding. The court rendered a decree applying the principles declared by the Supreme Court of the U. S. By that decree the title of the patentees from the U. S. of lands bordering on the lake was cleared of adverse claims made to lands within the lake or lakes as originally meandered; the court holding that the meander was not a boundary, but that grants to the original patentees of lands bordering on the lake gave title to the center of the lake, so that after such grants neither the State of Illinois, under the Swamp Land Grant, nor the patentees who had obtained patents under a survey, which had in 1874 been ordered by the Commissioner of the General Land Office as to the land inside of the meander indicating the border of the lake when originally surveyed by the U. S. surveyor, could properly claim title. The decree carefully indicated how the land within the meander and to be considered as accretions or relictions, should be divided, so as to allow each of the shore proprietors his due portion of what was originally considered a part of the lake; and certain meander points as between Sections 20 and 29 on the Eastern line of Hyde Lake, so called, were designated, to correct the original survey, so as to divide the lake bed appropriately. Appeals were taken by persons claiming adversely to the original patentees of the border lands. Some of the appellants claimed title under the patents for the lake bed which had been issued in carrying out the survey of 1874 ordered by the Commissioner of the General Land Office; and the case was passed upon by the Supreme Court of the state, on a first appeal and again on a second appeal.[4]

The Supreme Court of the State considered itself at liberty to treat the matter

(4) Fuller v. Shedd, 161 Ill. 462, 494; Hardin v. Shedd, 177 Ill. 123.

independently of the ruling of the Supreme Court of the U. S., so far as concerned dominion over the water and the original lake bed, and in doing so held that the common law to be applied should be taken or viewed as the state court had held it to be in two Illinois cases which the Supreme Court of the U. S. had carefully noticed, but had not chosen to follow as to a lake specially found to be non-navigable. The ruling of the state court adversely to the higher court was that the same doctrine was to be applied as to a non-navigable lake meandered by the government surveyor that the court had applied to a navigable lake, to-wit: Lake Michigan, and therefore that it was the law of Illinois as to a meandered lake, such as the one under consideration, that the riparian owner took to the water's edge, and that each proprietor could follow the recession of waters to their edge, yet over the waters and bed when covered with water the state exercised control, and held in trust for all the people.[5]

The opinion of the court was by Mr. Justice Phillips, and he suggested that the recent policy of the state had been to stock its waters with fish, thus intimating that the legislation of the state could affect the title or be considered in determining what was the common law in such a case.

What had been supposed by the Supreme Court of the U. S. to be a property right, resolvable according to common law principles, and to be determined by a construction of the patent from the government, was thus held by the state court to be within the control of the state by its legislation and its decisions. Why? Because the lake in government territory, was meandered; notwithstanding which fact the court had, however, expressly found it to be non-navigable.[6] And enlarging on the idea that the state was to be the arbiter as to the rights of the lake shore proprietors in the given case, Mr. Justice Phillips declared, "So long as such meandered lakes exist, over the waters and bed when covered with water, the state exercises control and holds the same in trust for the people, who alike have the benefit thereof in fishing, boating and the like."

Such views are much akin to those which Gov. Edwards put forward in a message to the General Assembly of Illinois as to the public lands; views well riddled by Henry Clay by the use of a few words in a speech in the U. S. Senate.

It is true that in Hardin v. Jordan, *supra*, the opinion, which was by Mr. Justice Bradley, used the expression that the question as to boundary was to be resolved by the local law, that is to say, the law of the State of Illinois, but the latter form of expression was supposed to be synonymous with the expression, the common law in such a case; and in considering what was the common law it was not supposed that either recent legislation or the decision of a local tribunal in Illinois could give title to lands, the title to which was to be traced from the U. S.

The decision in Hardin v. Jordan, *supra*, was followed by a judgment in ejectment in the Circuit Court of the United States, which judgment expressly entitled the plaintiff to hold title to the center of the lake in part and as to another part to the center of a bay which was found to be a part of the lake next to one of the plaintiff's lake shore tracts.

Fuller v. Shedd, *supra*, and Hardin v. Shedd, *supra*, were one and the same case. By the first decision therein claims to the lake bed in opposition to the patentees for the lake shore tracts were quieted, but a controversy remained between two of the shore proprietors as to the extension of their parcels or some of them. The judgment of the U. S. Court in Hardin v. Jordan was offered at the second hearing, but Judge Tuley decided that in view of the findings of the appellate tribunal, new evi-

(5) Fuller v. Shedd, supra, 493.
(6) Id., p. 473.

dence was not to be considered. A writ of error carried the case to the Supreme Court of the United States, where it is reported as Hardin v. Shedd.[7]

The whole subject was in a measure rediscussed, though it was claimed that Hardin v. Jordan, *supra,* and Mitchell v. Smale, *supra,* applied the law, and that too, as to the identical property. But in the opinion of the court, which was by Mr. Justice Holmes, effect was not given remediably to the former decisions of the court, but the decision of the state court in Fuller v. Shedd, *supra,* and Hardin v. Shedd, *supra,* was affirmed; the higher court yielding to the state court upon a question of federal law; adding, however, an expression that the plat of the survey had designated the lake as navigable; a fact which was fully apparent when the cases of Hardin v. Jordan and Mitchell v. Smale, *supra,* were before the court.

The idea of "state law" was allowed to dominate to the exclusion of the consideration previously given to the question what was the common law on the subject. Nevertheless, it must be said that the matter was very thoroughly digested in Hardin v. Jordan, and Mitchell v. Smale, *supra,* and that Judge Tuley's opinion and decree as first rendered secured all essential rights to the public in the lake as long as it existed as a body of water; and whatever confusion there may be, and in fact there is enough confusion, in adjusting the rights of shore owners, since the lake bed is subject from the recession and subsidence of water to be divided up and utilized, arises from not adhering to the earlier decision Neither Fuller v. Shedd, *supra,* nor Hardin v. Shedd, *supra,* in the difference from the earlier cases, has tended to a better settlement of the law of the case, or the promotion of public interests.

Conservation of the rights of both the owners and the public would have been much facilitated by a better adherence to the decisions of the Supreme Court of the United States, which first declared what was the common law rule. Parts of the body of water, the lands within which were involved in the cases, were at first to some extent, marsh or lowlands. Speaking generally, the body of water in its outspread or ramifications was partly in Illinois, and partly in Indiana. When the water subsided, and land was exposed, as it was found to be exposed as early as 1874, different names had been given to divisions of it in Illinois, such as Hyde Lake as to a part, and Wolf Lake as to a part; and the smaller part in Indiana has sometimes been called Lake George; though formerly all parts were more or less linked together.

The plat of the part in Indiana in the government survey omitted the words, navigable lake, applied to the Illinois part in the government survey. But nearly the whole body of water, such as remained in parts, lost utility for boating or the culture of fish. This was largely the case when the Commissioner of the General Land Office ordered, in 1874, a survey under which patents were issued to the lands inside of the meander, but had become very much the state of case before the claim under those patents was suppressed.

Much of the law on the subject of the rights of the shore owners, necessary for consideration as the lake receded or disappeared, was suggested in Judge Cooley's article first mentioned above. If his suggestions had been followed, valuable time would have been saved.

Perhaps the inconvenience arising from the departure by the Supreme Court of Illinois from the doctrine laid down by the Supreme Court of the United States, is, in a measure, modified by a proffered recognition of riparian rights in the shore proprietors; which recognition is impliedly to the full extent of all land from which the water recedes. But under the ruling

(7) 190 U. S. 508.

in Hardin v. Jordan, and Mitchell v. Smale, *supra,* a court of equity, under its jurisdiction as to boundary, could have made a fairer apportionment, and better protection would have been given to all having land bounded by the water, and that without jeopardizing rights of the public or rights held in common.

In Fuller v. Shedd, *supra,* the Supreme Court of Illinois claimed the prerogative of declaring finally what rights attached to or would follow from a grant by the United States of congressional subdivisions made fractional because of bordering on a meandered lake within that state, even when such lake was especially found to be non-navigable. The court at the same time called attention to the fact that Hardin v. Jordan, *supra,* was by a divided court; this being assigned as a reason why the state court chose to hold its own views on the subject. It is at the same time true that the opinion of the national tribunal was followed as to the main matter in issue, to-wit: the invalidity of the survey and sale by the United States of the land within the meander after the bordering tracts had been sold. The different declaration related to the character, or immediate extent, of the riparian right, or as to extending side lines.

When, in the course of time, Hardin v. Shedd, *supra,* came on to be heard, there had been such a change in the membership of the Supreme Court of the United States that there remained on the bench but four members who had participated in deciding Hardin v. Jordan and Mitchell v. Smale, *supra,* and two out of the four had dissented from the opinion in that case.

The opinion by Mr. Justice Holmes, speaking for the majority of the court in Hardin v. Shedd, *supra,* thereupon stated that it had been established *almost without argument* that when land is conveyed by the United States on a non-navigable lake *belonging to it,* the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. Pretty soon the learned Justice added, "The law of Illinois has been settled *since Hardin v. Jordan;* meaning that the law was so settled by the case under review and a later Illinois case specified. The opinion, however, declared that conveyances by the United States of the upland do not carry adjoining land below the water line.

Did the opinion consider what was the common law as to the boundary of lands when non-navigable waters were named as a boundary? Scarcely more than to observe, *the Supreme Court* of Illinois has made certain decisions since this court entered its judgment as to that matter.

Nor does notice seem to have been taken of the fact that riparian rights in the case were in fact recognized by the decree which was under consideration and which, by the action taken, stood as if affirmed; rights of ownership of lands from which the water receded.

In a case decided but a few days earlier,[8] the same court, speaking, too, by Mr. Justice Holmes, recognized and in a general sense followed Hardin v. Jordan, *supra.* In the same opinion reference was made to the swamp land grant as supporting the holding of the court; but the main expression seems to be that the law, as declared in Indiana, gave title to the land on the lake and to a part of the lake to fill out subdivisions under the U. S. Patents.

The propriety of giving such effect to decisions in a particular state as controlling in the construction of grants by the United States, is vigorously denied in an elaborate dissenting opinion in the latter case by Mr. Justice White, since Chief Justice,[9] various parts of which opinion should receive consideration in any general review of the main topic.

The methods allowed or adopted in Indiana and Michigan, of dividing lake beds

(8) Keen v. Calumet Co., 190 U. S. 452.
(9) Id., 461-507.

when unsubmerged are more practical than the one suggested by the Supreme Court of Illinois in the principal case. The funeral service in that court of so much of the opinion of the federal supreme court as would have operated as to side lines looking towards the center of the lake, would bring mourning in trying to have such lines at all. Yet the supreme court of the state chose in that service to claim championship for the people of the state; omitting, however, to notice that the higher court, in rendering its judgment, did not weaken the hand of equity in respect to extending side lines, nor even exclude the protection by the state or otherwise of rights held in common.

Mr. Justice White, in his dissenting opinion in Kean v. Calumet Co., *supra*, did not fail to observe that rules applicable to a great and permanent body of water like Lake Michigan are not practicable nor appropriate as to a small, non-navigable lake; or should not be declared arbitrarily when not of an order sanctioned by experience and approved adjudications.

THOMAS DENT.

Chicago, Ill.

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DEATH—SURVIVAL OF ACTION.

CAPITAL TRUST CO. v. GREAT NORTHERN RY. CO.

Supreme Court of Minnesota. Oct. 9, 1914.

149 N. W. 14.

When a person lives an appreciable length of time after receiving an injury through a defendant's negligence, even though in a state of unconsciousness, his cause of action survives under section 9 of the Federal Employers' Liability Act, April 22, 1908, added by Act April 5, 1910. Testimony that plaintiff's intestate after the injury moaned and breathed for ten minutes justified the court in submitting the question of the survival of his cause of action to the jury.

HOLT, J. While working for defendant, a carrier of interstate commerce, Wm. A. Ward, a switchman, was killed. The administrator of his estate brought this action under the Federal Employers' Liability Act to recover damages; the claim being that Ward's injuries and death resulted from defendant's negligence. Plaintiff received a verdict, and defendant appeals from the order denying its alternative motion for judgment or a new trial.

Ward's injuries were received subsequent to the amendment of 1910 of the Federal Employers' Liability Act, and we do not understand that defendant challenges the correctness of the instructions of the court as to the proper damages in case Ward's cause of action survived. There being no conscious suffering nor any expenses for medical attendance, the court limited the recovery, in case he was not instantly killed, to the lost earning capacity. There was testimony that Ward, although unconscious, lived some moments after being removed from the train. The court instructed the jury that, if they found that he lived an appreciable length of time after the injury, his cause of action survived. The defendant contends that, since Ward "never regained consciousness and had no conscious period of suffering, there is no reason why the action should survive;" and that "the theory of a survival of action is that there was a period of time during which the deceased could have brought an action in his own behalf." By that, we assume, it is meant that there should have been a physical possibility to begin an action in his behalf before his death. The authorities cited do not support the contention.

In Kearney v. Boston & Worcester Ry. Co., 9 Cush. (Mass.) 108, a cause of action was held not to survive where "it is in evidence that there was only a momentary, spasmodic struggle, and the death instantaneous."

In the later case of Hollenbeck v. Berkshire Ry. Co., 9 Cush. (Mass.) 478, Chief Justice Shaw says:

"The accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer."

Chief Justice Bigelow in Bancroft v. Boston & Worcester Ry. Co., 11 Allen (Mass.) 34, says:

"The continuance of life after the accident, and not insensibility and want of consciousness, is the test by which to determine whether a cause of action survives."

"If the intestate lived after he was struck, though the time might be brief, the cause of action survived." Tully v. Fitchburg Railroad, 134 Mass. 499.

To the same effect is St. Louis, etc., Ry. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46; Beeler v. Butte, etc., Co., 41 Mont. 465, 110 Pac. 528; Kel-

low v. Central Iowa Ry. Co., 68 Iowa, 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858; Olivier v. Street Ry. Co., 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53; Ely v. Detroit United Ry. Co., 162 Mich. 287, 127 N. W. 259.

The case of Dillon v. Great Northern Ry. Co., 38 Mont. 485, 100 Pac. 960, is not in point for there was a stipulation that death was instantaneous.

In the case of Kellow v. Central Iowa Ry. Co., supra, the jury answered in the affirmative the question, "Was the death of the deceased of that nature commonly known as instant death?" Nevertheless the court held that such finding did not determine that a cause of action did not accrue to him before his death. The deceased was on a railroad train that was wrecked; when found in the wreck he breathed, but died before he could be removed. The court said:

"If he survived the injury but for a single moment, the cause of action accrued to him as certainly as it would have done if he had lived for a month or a year thereafter."

One of defendant's witnesses testified that Ward breathed when taken from under the car; Holden's testimony was that when he reached Ward after returning from riding the "kicked" car into the yard, which consumed about five minutes, he moaned and continued to breathe and live from three to five minutes longer. We think the testimony made the survival of Ward's cause of action a jury question.

(3) If the jury found that Ward lived an appreciable length of time after the injury, and we conclude the evidence so warrants, it cannot be said that the damages are excessive.

Order affirmed.

NOTE.—*Appreciable Time of Pain and Suffering of Decedent Killed by Accident.*—The federal employer's liability law has been amended so as to permit recovery, in addition to loss by death, for pain and suffering between an accident and death. In the instant case the damages were not deemed excessive because decedent "moaned and continued to breathe and live from three to five minutes" after the accident. This seems to give forcible application to the amendment of 1910 to the federal employer's liability act authorizing recovery for death and intervening pain and suffering after one is injured.

It has been said that the measure of damages for intervening suffering is what the recovery should be had one not died. Maher v. Traction Co., 181 Pa. 391, 37 Atl. 571; Hesse v. Meriden, etc. Co., 75 Conn. 571, 54 Atl. 299; Kyes v. Valley Tel. Co., 32 Mich. 281, 93 N. W. 623; Davidson Benedict Co. v. Severson, 109 Tenn. 572, 72 S. W. 967. But this kind of measure is difficult to comprehend, say, for example, where the injured man would die in a few minutes. It is hard to imagine a living man suing for a few minutes' suffering. His action rather has relation to suffering that impairs his earning capacity and generally his future condition. With representatives of a dead man suing, these things have no future, that is not embraced in the loss by death.

In The Corsair, 145 U. S. 335, 36 L. ed. 727, there was a libel *in rem* for a drowning caused by negligence and the petition alleged that in being drowned, decedent "suffered great mental and physical pains and shock, and endured the tortures and agonies of death," it taking a tug on which she was about 10 minutes to sink. The court said: "There is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it." In the instant case there was only five minutes intervening and decedent gave no signs of consciousness. There was surely allegation of consciousness in the Corsair case.

In Kennedy v. Standard Sugar Refinery Co., 125 Mass. 90, decedent lived 36 hours after an accident, and the judge refused to charge that if he was not unconscious during the time there could be no recovery. For this he was reversed. It was said also that for any supposed terror excited in the mind between the time of starting to fall and striking the ground, there was no proof of his condition of mind. It would seem to be almost a matter of judicial knowledge that the condition should be allowed for, unless it was practically contemporaneous with striking the ground.

In the Corsair case it was also said: "Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

In Olivier v. St. Ry. Co., 134 Mich. 367, 96 N. W. 434, 104 Am. St. R. 607, 3 Am. Cas. 53, it was said there is no instantaneous death where there is a comatose condition or unconsciousness, but this was said not in reference to any question of damages for suffering.

We think, that the better rule in this class of cases is not to consider brief periods of time—a few minutes—and leave the matter open to a jury to say whether one was conscious or unconscious, but the statute was intended rather to cover a substantial period of time, which required nursing or made a lingering death. The old question of instantaneous death or not was considered from a vastly different standpoint, and statutes giving remedy for pain and suffering meant their application where death was not practically contemporaneous. To say they are to be applied as if the decedent had lived, states a case which never would be found in any litigation.

Cases of instantaneous death, *rel non*, generally have occurred in suits by a father for loss of services of his child and expense in treatment, or where a husband sues for like things in regard to his wife. The Corsair case is pertinent authority on the question involved, and its ruling is fortified by the context in which the amendment occurs. It would be singular to suppose

that for death under the federal employer's liability act, where nothing is allowed but for loss of a husband's services in case of death, that anything else would be intended where there was pain and suffering but as it prolonged life an appreciable time and beneficiaries incurred expense in treatment. C.

## ITEMS OF PROFESSIONAL INTEREST.

### RECENT DECISIONS OF NEW YORK COUNTY LAWYERS' ASSOCIATION.—COMMITTEE ON PROFESSIONAL ETHICS.

#### QUESTION No. 75.

A client has newly furnished me with evidence to nullify certain bankruptcy proceedings on account of fraud and collusion between the insolvent and some of his creditors. Other bona fide creditors have come to me to consult me in regard to this evidence with a view of retaining me in their behalf. The client first above referred to is implicated in the tainted acts alluded to.

1. Assuming that the said client gives his consent, and his legitimate interests are not prejudiced thereby, may I act for the bona fide creditors by using the evidence in their legitimate interests?

2. If not, may I refer said bona fide creditors to some reputable attorney of my acquaintance, with a view of the latter acting in their behalf the same as I would have done, if I could properly act in the premises?

#### ANSWER No. 75.

In the opinion of the committee, in the absence of facts, if any, not disclosed by the question, which might reveal other duties on the part of the attorney, the inquirer may, since his original client consents, with propriety act in behalf of the bona fide creditors. The question discloses no reason why the course suggested in Section 2 of the question should be followed rather than that suggested in Section 1; but if there be any such reason, or if the inquirer prefers, the committee sees no objection to the inquirer's referring the bona fide creditors to some other reputable attorney, as suggested in Section 2.

#### QUESTION No. 76.

Will you please advise us whether the following is a breach of legal ethics: A and B, co-partners, receive a note for $50 from C. The note is drawn in the office of the attorney of A and B, is signed by C in his presence and delivered by the attorney to A and B. The note is not paid at its due date. Subsequently suit is instituted on behalf of A and B by the same attorney in whose office the note is drawn and the suit is brought in a municipal court. On the return day of the summons, the attorney appears for A and B, answers "action on a promissory note," and there being no answer for the defendant, stated "ready for inquest." When the case is called, the attorney takes the stand and testifies as to the note.

#### ANSWER No. 76.

In the opinion of the committee, there is no breach of professional ethics when the attorney for the plaintiff testifies truthfully, of his own knowledge, upon an inquest taken after defendant's default in an action upon a promissory note.

Such a case is not within the reason of the general rule which forbids a lawyer to be counsel and witness in the same case. In the case stated, the lawyer's testimony is formal, ex parte, and not disputed.

#### QUESTION No. 77.

Attorney for plaintiff in an action for divorce, in which a judgment dismissing the complaint has been entered, and all costs and fees settled, has among the papers in his files a copy of an answer served in the action, making counter-charges against plaintiff (the wife), that answer not being on file for the reason that it was withdrawn and a general denial substituted. Plaintiff demands this copy of the answer containing counter-charges, assigning as a reason that the attorney has permitted its contents to become known, to her injury. She threatened to proceed against the attorney and he desires to retain the paper as part of his office record in the action to show the extent and character of his services if they be questioned, and, as a matter of fact, she has herself submitted the answer in question which also reflects on the attorney to one or more others, and has caused the same to be served on the attorney as part of a set of papers on a motion since abandoned. Should the attorney, as a matter of law or ethics, surrender the copy of the answer to his former client, or consent to have it destroyed, or is there anything else he should do?

#### ANSWER No. 77.

It appears to the committee that the dispute involves the question of the legal right to the possession of papers served in an action, and upon that point of law, the committee expresses no opinion. Aside from this, there appears to be no principle of professional ethics involved.

## BOOK REVIEWS.

### THORNTON ON ATTORNEYS AT LAW.

The two volumes, being a treatise on attorneys at law by Mr. Edward M. Thornton, a posthumous work of the author, except the final chapter on suspension and disbarment, make a very complete work, dealing as they do with admission to practice, relations to court and to client and the privileges and liabilities of an attorney at law.

They take in advice of counsel, right of compensation and power of representation, and, conversely, offenses by an attorney in champerty, barratry and maintenance, and his liabilities to third persons. Especially interesting is the chapter on law partnerships. Indeed, there is a wealth of decision touching the duties, rights, liabilities and compensation of practitioners in about every situation that arises, the notes greatly supplementing the terse, clear propositions stated in the text. Grounds and proceedings for disbarment are well treated in this work, and upon the whole the work with its orderly arrangement, clear text and completeness make a most desirable addition to legal literature.

The work, as said, is in two volumes, bound in buckram, running in paging to nearly 1,500 pages, inclusive of table of contents and an admirable index, and represents artistic superiority such as should come from one of our standard publishers, Edward Thompson Company, Northport, Long Island, N. Y., 1914.

### MEMOIR AND ADDRESSES OF U. M. ROSE.

The career of Judge Rose was of long duration and great achievement. He was a lawyer not altogether of the old school, but he mixed in his success as a man and a lawyer, the practical things with the ideal in a way to round out his life as an example to his profession and as a credit to humanity.

Starting as an orphan boy, without friends or influence, he won both by the simplicity and strength of his intellect and the unfailing courtesy of his demeanor. His opponents as well as his associates became his admirers and his friends.

The matter and the style of his addresses appearing in the volume before us exhibit not only his deep learning, but also his straightforward common sense and the keenness of an intellect that sounded the depths of every subject that he treated and the play of a human fancy that is charming in its direct simplicity. We scarcely can discriminate in the selection of his addresses, whether made to bar associations, to law students, graduating classes, of a historical nature, or to the Hague or on memorial occasions. All are replete in learning, characteristic in style, pure in diction and exhibiting the soul of a sincere man. His son, Mr. George B. Rose, makes a distinct contribution to legal and general literature in preserving them in the form in which they are published.

The work is in one volume of four hundred pages, bound in cloth and the publication is by George I. Jones, Chicago, 1914.

## HUMOR OF THE LAW.

In the heat of his arguments to an intelligent-looking jury (something very rare), a young attorney leaned forward and imparted this valuable information, "*Vox populi, Vox Dei.*" The jury was very much impressed with this valuable piece of knowledge, and with one accord bowed their heads in acknowledgment of this great truth.

Two attorneys of the local bar, who were at the time trying to outgeneral each other in spitting at the only clean spot on the floor, were also visibly impressed.

"I'll bet you ten dollars," said one, "you don't know what that means."

"I don't know?" replied the other. "Of course I know."

The money was put up in the hands of a friend.

"Now, what does it mean?" asked the first attorney.

"Why! it means," said the second attorney, and here he drew himself up with a superior air, "*Vox populi, Vox Dei*, is French and means, 'My God, why hast thou forsaken me.'"

The first attorney was crestfallen.

"By heck," he said, "he did know. Give him the ten."—*Green Bag.*

### THE BANKRUPT WAY.

Creditors came pressing hard,
Unpaid statements by the yard.
Some impelled by ruthless greed,
Some because they, too, had need;
All determined to possess
Every cent and nothing less.
One way only could we see;
That led to the Referee.
So, our schedules here we bring;
Our possessions emptying
Unreservedly, complete,
At the Trustee's willing feet.
Let the greedy creditors,
Traders, doctors, editors,
Take their portions, one and all.
On the plunder let them fall,
Thus despoiled will we depart,
With bare hand and heavy heart,
Empty larder, empty purse,—
Not so bad, but might be worse—
Not a primrose in our day;
We have come the bankrupt way.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Bankruptcy**—Practice.—An order by the state court for the delivery, to the receiver in bankruptcy of the defendant corporation, of possession of land, the title to which was in issue in an insolvency action brought against the corporation in the state court by creditors, held error, though an order for the delivery to the receiver of all assets clearly belonging to the bankrupt and not in controversy would have been proper.—Harris v. Luxury Fruit Co., Ga., 82 S. E. 447.

2.——Practice.—The referee in bankruptcy in a proceeding by the trustee to compel a bankrupt to turn over money in his possession or under his control should in the first instance have merely found that such money was in his possession or under his control at the date of bankruptcy, leaving its subsequent disposition for inquiry under such further proceedings as might be taken.—In re Pennell, U. S. C. C. A., 214 Fed. 337.

3.——Practice.—Where it was agreed between the landlord and the bankrupt that the counter indebtedness of the landlord to the bankrupt should be applied as it arose to other indebtedness of the bankrupt to the landlord than rent, it would be so applied, though such application resulted in a larger claim for rent, entitled to priority.—In re Bell Engraving Co., U. S. D. C., 214 Fed. 510.

4.——Practice.—Where a referee's findings were not sufficiently definite to enable the court on a petition to review to determine the legal questions involved, the proceeding will be remanded to the referee for further hearing and additional findings.—In re Hawley Down Draft Furnace Co., U. S. D. C., 214 Fed. 500.

5.——Wife as Creditor.—The fact that an alleged creditor of a bankrupt is his wife does not bar her assertion of her rights as a creditor, but, if her claim is disputed, the burden is on her to establish it by proof.—In re Crumling, U. S. D. C., 214 Fed. 503.

6. **Bills and Notes**—Check.—Where defendant issued his check to plaintiff for use by plaintiff in paying a debt of defendant, owed to plaintiff or someone else, when a contract between defendant and another had been performed, the right of plaintiff to use the check would not arise until the contract was performed.—Gunby v. Hayden, Mo., 168 S. W. 899.

7.——Irregular Indorsement.—Where one writes his name on the back of the note as indorser, at its inception, and not after it is fully executed, it is an irregular indorsement.—Long v. Gwin, Ala., 66 So. 88.

8.——Notice.—An agreement between the makers of a note that it should not be used unless signed by other parties will not defeat the payee's right to recover on it, unless he had notice thereof when he accepted it.—Solomon v. Merchants' & Planters' Nat. Bank, Tex., 168 S. W. 1029.

9.——Surety.—That a note is signed by one as "surety" does not affect the signer's liability to the payee; a surety being one who at the request of another, and for his benefit, becomes responsible for some act in favor of a third party.—Ensign v. Dunn, Mich., 148 N. W. 343.

10. **Brokers**—Consideration.—Where a broker effected an exchange of corporate property, although the agreement for the exchange and for the payment of commission was in form made by the president of the corporation in his individual capacity, there is sufficient consideration to support a recovery of the commission agreed upon.—Morton v. Manchester Inv. Co., Mo., 168 S. W. 904.

11.——Misrepresentation.—Where a real estate broker fraudulently misrepresents the financial ability of the purchaser, and the principal, on discovering that the purchaser is unable to carry out the contract, rescinds, the broker is not entitled to a commission.—Meyer v. Keating Land & Mortgage Co., Minn., 148 N. W. 452.

12. **Carriers of Goods**—Action for.—Where a car load of fruits was shipped with the privilege of unloading certain bananas in one county and certain other bananas in another county, and neither were unloaded because of injury to the shipment, the consignor could not maintain a separate action in each county for injuries to the fruit intended to be unloaded in each.—Texas & P. Ry. Co. v. Southern Produce Co., Tex., 168 S. W. 999.

13.——Waiver.—Acts of a carrier in indorsing its freight bill with a notation of loss, and in replying to the shipper's claim a year afterwards that on a reduction to invoice figures it would pay, held a waiver of a provision of that claim for loss should be made within four months.—Sauls-Barker Co. v. Atlantic Coast Line R. Co., S. C., 82 S. E. 418.

14. **Carriers of Live Stock**—Damages.—Where inferior animals are substituted for those comprising an interstate shipment under a contract limiting liability to an agreed valuation for each animal, damages are recoverable on the basis of actual value, unless wrongful conversion and gross or wanton negligence of the carrier is negative.—Nashville, C. & St. L. Ry. Co. v. C. V. Truitt Co., Ga., 82 S. E. 465.

15. **Carriers of Passengers**—Contributory Negligence.—A street car passenger is not negligent as a matter of law in rising as the car begins to slow down on approaching her destination and standing with one hand on the seat and the other holding her bundles.—Robinson v. Little Rock Ry. & Electric Co., Ark., 168 S. W. 1125.

16.——Minimizing Damages.—A passenger is not required to minimize, by paying a cash fare, damages from an anticipated wrong of ejection, when the ticket presented by him is good, but is claimed by the conductor to be bad.—McKeown v. Southern Ry. Co., S. C., 82 S. E. 437.

17.——Negligence.—In an action for injuries to a passenger on a freight train, an instruction that, though occasional jars and jerks in the operation of such trains will not constitute negligence, jars of great, unusual and unnecessary violence are evidence of negligence in the operation of the train was proper.—St. Louis & S. F. R. Co. v. Coy, Ark., 168 S. W. 1106.

18. **Commerce**—Intoxicating Liquors.—Under the Webb Law, an interstate carrier in possession of liquor in the state for delivery to a person intending to use it in violation of law is amenable to the state laws, unless it has no knowledge of the unlawful purpose.—Southern Express Co. v. State, Ala., 66 So. 115.

19. **Compromise and Settlement**—Matters In Dispute.—The mere existence of a controversy without a suit pending, is not sufficient consideration to support a parol settlement, unless there be reasonable ground for the controversy, but a compromise of matters in dispute between litigants, in the absence of fraud, is of itself sufficient consideration to uphold a parol contract of settlement.—Burleson v. Mays, Ala., 66 So. 36.

20. **Conspiracy**—Overt Acts.—A conspiracy cannot be made the subject of a civil action, though damage results, unless something is done, which, without the conspiracy, would give a right of action; the test being whether the act accomplished after the conspiracy has been formed is itself objectionable.—Kruegel v. Murphy, Tex., 168 S. W. 983.

21. **Contempt**—Interlocutory Judgment.—A contempt order to coerce a witness to testify in a civil suit, which is purely remedial as between the parties, remains interlocutory and is not reviewable except on appeal from a final decree.—Hultberg v. Anderson, U. S. C. C. A., 214 Fed. 349.

22. **Contracts**—Election of Remedy.—A party induced by fraud to make a contract must, on discovery of the fraud, elect either to stand on the contract or rescind it, and when he seeks to rescind he must do so unequivocally.—Watson Fireproof Window Co. v. Henry Weis Cornice Co., Mo., 168 S. W. 905.

23.——Reasonable Time.—Where the time for performance of a contract otherwise complete is not specified, the presumed intent that performance shall be within a reasonable time under the circumstances will be read into the contract as if originally expressed therein.—Northrup v. Scott, 148 N. Y. Supp. 846.

24. **Corporations**—Collateral Suit.—A plaintiff may not, in a collateral suit, assail the legal existence of a corporation and charge the stockholders with liability as partners doing business in the name of a fictitious corporation.—O'Kell v. Chama Valley Lands & Irrigation Co., Mo., 168 S. W. 887.

25.——Contract.—Where the president of a corporation, who owned practically the entire stock, acting for the corporation, agreed to pay plaintiff a commission for effecting an exchange of corporate property, and signed the contract for the exchange in his own name, without designating himself as president or as acting for the defendant, plaintiff may recover the commission from the corporation.—Morton v. Manchester Inv. Co., Mo., 168 S. W. 904.

26.——Guarantors.—A guaranty contract made by stockholders of a corporation held not to bind the guarantors for the payment of bonds of the corporation bought, not for the benefit of the corporation, by the bank to which the guaranty was given to secure payment of notes, etc.—First Nat. Bank of Waterloo v. Story, 148 N. Y. Supp. 886.

27.——Marshaling Assets.—Since a corporation cannot, as plaintiff, sue to marshal its own assets, the appointment of a receiver under such a proceeding, over the objection of creditors, is erroneous.—Bank of Soperton v. Empire Realty Trust Co., Ga., 82 S. E. 464.

28.——Stockholders.—Stockholders of a corporation are entitled to maintain an action for its benefit to recover assets wasted or fraudulently appropriated by the corporation's officers on refusal of the directors to institute such action.—State ex rel. American Bankers' Assur. Co. v. McQuillin, Mo., 168 S. W. 924.

29.——Subscription to Stock.—The defense that a call for payment on a subscription to stock cannot be made till all has been taken, when the capital stock is fixed by the act of incorporation, is not available after the articles of association have been filed and certificate of corporate existence has been duly issued.—Commerce Trust Co. v. Hettinger, Mo., 168 S. W. 911.

30.——Transfer of Stock.—Until transfer of stock on the books of the corporation the seller is the nominal owner; is a trustee for the purchaser subject to all the liabilities attaching to the stock, being under an implied obligation to see that such liabilities will not come on the seller.—Richards v. Robin, 148 N. Y. Supp. 822.

31. **Courts**—Stare Decisis.—The rule of stare decisis does not apply to an advisory opinion given by the justices in response to a question from the general court.—Young v. Duncan, Mass., 106 N. E. 1.

32. **Covenants**—Notice.—Where a subsequent grantee of a lot in a tract, obtaining a deed containing no building restrictions, had no actual notice of the covenants in the deeds of other lots to prior grantees, who had violated the covenants in their deeds, the subsequent grantee was not bound by the covenants at the suit of the prior grantees.—Schermerhorn v. Bedell, 148 N. Y. Supp. 896.

33. **Criminal Law**—Alibi.—The defense of alibi is entitled to be considered by the jury the same as any other defense.—State v. Smalls, S. C., 82 S. E. 421.

34.——Confession.—A confession made by accused after he had been questioned by the prosecutor for several hours, and was being held by a deputy sheriff, is not voluntary, where the prosecuting officers and the deputy sheriff played upon his emotions and attempted by all means to extract the confession.—People v. Prestige, Mich., 148 N. W. 347.

35. **Deeds**—Evidence.—In an action for possession of land, tax receipts offered by plaintiff are properly received in evidence to prove claim of ownership and that the state had parted with its title.—Mitchell v. Hamilton, S. C., 82 S. E. 425.

36.——"More or Less."—A deed which describes the premises, giving the boundaries and estimating the area as a certain number of acres, "more or less," conveys all the lands embraced in the calls, though the acreage may exceed the estimate.—McElroy v. McElroy, Ga., 82 S. E. 442.

37. **Descent and Distribution**—Settlement by Heirs.—Where the heirs of a decedant entered into an agreement settling the estate, no claims having been filed with the administrator, one heir may maintain a bill against his coheir for an accounting to obtain his share of the decedent's property secreted by the coheir.—Powell v. Pennock, Mich., 148 N. W. 430.

38. **Ejectment**—Parties.—Where the right of all the parties in an action to recover land, to sue as joint plaintiffs, is not challenged, it is error to instruct that a recovery cannot be had by the plaintiffs, unless all of them are entitled to recover.—McElroy v. McElroy, Ga., 82 S. E. 442.

39. **Escrows**—Action.—A holder of checks in escrow, to be turned over to defendant on a trade with a third person going through, is not entitled to sue defendant on the check drawn by him pending suit for specific performance of the contract of exchange by the third person.—Gunby v. Hayden, Mo., 168 S. W. 899.

40.——Delivery in.—A deed cannot be delivered to the grantee as an escrow, and if it is delivered to him it becomes an operative deed freed from any condition not expressed in the deed itself.—Keenan & Wade v. City of Trenton. Tenn., 168 S. W. 1053.

41. **Estoppel**—Recitals in Deed.—Ordinarily a grantee in a deed is not estopped by the recitals therein, but, when the recital shows that the object of the parties is to make the matter recited a fixed fact, the recital is binding on all the parties and their privies.—Pendrey v. Godwin, Ala., 66 So. 43.

42. **Evidence**—Damages.—In an action for injuries to a female passenger, who claimed to have had a miscarriage as a result thereof, evidence of statements showing a resolution by her, prior to former miscarriage, to resort, in case of pregnancy, to means to produce abortion, held admissible.—Missouri, K. & T. Ry. Co. of Texas v. Killet, Tex., 168 S. W. 979.

43.——Dying Declaration.—Where deceased, after making a dying declaration tending to shew that the killing was murder, made a second declaration which exonerated accused, the second declaration should be received as the statement of the facts leading up to the difficulty, and it is improper to restrict it to the purpose of discrediting the first.—Tittle v. State, Ala., 66 So. 10.

44. **Executors and Administrators**.—Expenses.—Where part of a testator's property consisted of expensive furniture and a large residence which had to be carefully cared for

to be sold to advantage, the executor is entitled to credit for sums paid servants for the care of the property.—In re Watson, 148 N. Y. Supp. 902.

45. **False Imprisonment**—Bail Bond.—In an action for false imprisonment consisting of an unlawful arrest by bail the bond is admissible in justification only where the right of the bail to make the arrest is properly pleaded, and, if not so pleaded, is admissible only in mitigation.—Nicholson v. Killpatrick, Ala., 66 So. 8.

46. **Fixtures**—Removability.—A sublessee of an amusement park may, in the absence of any provision in the lease to the contrary, remove during the term appliances placed in the park for amusement.—Walker v. Tillis, Ala., 66 So. 54.

47. **Frauds, Statute of**—Deeds.—Where a compromise and settlement of a will contest involved the transfer of title to certain land, a parol agreement of settlement without the passing of deeds was insufficient to vest title to the land in accordance with the settlement, under the statute of frauds.—Burleson v. Mays, Ala., 66 So. 36.

48.——Default of Another.—An attorney's promise to the sheriff to be responsible for a negro, convicted of a misdemeanor, because he was going to appeal the case, by which he induced the sheriff to surrender the negro to him, held a promise to answer for the debt or default of another within the statute of frauds. Flenniken v. Harmon, Ark., 168 S. W. 1081.

49.——Estoppel.—The statute of frauds is an insuperable obstacle to the application of the doctrine of an estoppel to a ten-year lease to preclude persons not parties to the writing from denying its validity.—Hartz v. Hilsendegen, Mich., 148 N. W. 433.

50.——Executed Contract.—Where plaintiff's grantor was put in possession of certain land in controversy by defendant, pursuant to an oral compromise and settlement of a will contest, and remained in possession until she sold the land to plaintiff, the settlement agreement was executed and not within the statute of frauds.—Burleson v. Mays, Ala., 66 So. 36.

51.——Joint Adventure.—An agreement between plaintiff and defendant that certain land should be bought for their joint benefit, and the profits divided, being in the nature of a partnership or joint adventure, was not within the statute of frauds.—Sonnesyn v. Hawbaker, Minn., 148 N. W. 476.

52. **Fraudulent Conveyances**—Equity. — A creditor may maintain a bill for discovery, and to subject to his demand the proceeds of money fraudulently donated by the debtor to the defendants; this being an independent equity sufficient of itself to support the bill.—Shelton v. Timons, Ala., 66 So. 9.

53.——Waiver.—A creditor who knew nothing of his debtor's sale of his stock of goods in bulk, or that it had been made contrary to the Bulk Sales Act, by his conversation with the seller in the presence of the purchaser, could not waive his rights under the act.—Coffey v. McGahey, Mich., 148 N. W. 356.

54. **Garnishment**—Negotiable Note.—A negotiable note is not subject to garnishment, and, where the only proof was the execution of the note to a third person for the price of land and the garnishee's duly abstracted judgment against such third person, there was nothing to take it out of the rule.—Guillot v. Wallace, Tex., 168 S. W. 978.

55. **Gifts**—Parol.—Where after an alleged parol gift by a grantor of land to his children who were already in possession there was no change in their possession, no improvements were made, and no taxes were paid, the children cannot, as against a purchaser from the grantor, hold the land.—Givens v. Hinton, Ark., 168 S. W. 1079.

56. **Homicide**—Assault With Intent.—Where, in a prosecution for assault with intent to murder by the administering of glass with food, the uncontradicted evidence showed that the prosecutor discovered the glass and declined to eat the food, a conviction was unauthorized.—Leary v. State, Ga., 82 S. E. 471.

57.——Gross Carelessness.—To render the driver of an automobile criminally liable for the death of a person struck by the automobile, his carelessness in driving must be gross, implying an indifference to consequences.—People v. Barnes, Mich., 148 N. W. 400.

58.——Self-Defense.—Where accused was in actual imminent peril of his life or of serious bodily harm at the time he shot decedent, and the other conditions requisite to the right of self-defense were present, accused's honest belief in peril is immaterial.—O'Rear v. State, Ala., 66 So. 81.

59. **Husband and Wife**—Consideration.—A married woman may convey her property in payment of, or security for, her husband's debt, and such conveyance has a sufficient consideration.—Lewis v. Doyle, Mich., 148 N. W. 407.

60.——Husband's Debt.—Where a note given by a husband and wife was for a debt of the husband, it was void as to the wife without reference to the capacity in which he or she signed or the understanding between them.—Ensign v. Dunn, Mich., 148 N. W. 343.

61.——Tenants by Entirety.—A mortgage executed by husband and wife on land owned by them as tenants in the entirety to secure a loan made to the husband is valid.—Ehle v. Looker, Mich., 148 N. W. 378.

62.——Wife's Services.—Since a husband may recover merely for deprivation of his wife's society and services from injury to her through another's fault, and not for the injury itself, the complaint in his action for the damages recoverable need not itemize the particular injuries to his wife.—Birmingham Ry., Light & Power Co. v. Roach, Ala., 66 So. 82.

63. **Insurance**—Burden of Proof.—A beneficiary suing on a fraternal benefit certificate has the burden of proving that the certificate subject to forfeiture for nonpayment of dues was in force at the death of the member.—Supreme Lodge of Pathfinder v. Johnson, Tex., 168 S. W. 1010.

64.——Indemnity Company.—An employer's indemnity company by assuming the defense of a negligence action pursuant to its policy is not estopped from denying liability thereon.—United Waste Mfg. Co. v. Maryland Casualty Co., 148 N. Y. Supp. 852.

65.——Insurable Interest.—A person may procure insurance on his own life and assign it to one who has no insurable interest, if this is not done as a cover for a wager policy.—Prudential Ins. Co. of America v. Williams, Ark., 168 S. W. 1114.

66.——Misrepresentations.—In an action on a fire insurance policy, defended on the ground that it was void because obtained through false representations of the applicant as to his identity, evidence as to the many fires occurring in the business experience of the applicant held admissible on the question of his misrepresentations, and on the question whether the insurer would have issued the policy had he known his identity.—Johnson v. Reliance Ins. Co. of Philadelphia, Pa., Mo., 168 S. W. 914.

67.——Notice.—Where an accident policy required insured to give notice as soon as possible after injury, and the insured's evidence showed that he could have given early notice, it was error to submit to the jury the question whether the notice was given within a reasonable time, even though the purpose of the provision was to protect the insured against fraudulent claims.—Hummer v. Midland Casualty Co., Mich., 148 N. W. 413.

68. **Judgment** — Practical Construction.—Where the meaning of a judgment is uncertain and cannot be clearly gathered from the record, a construction adopted or acquiesced in by the parties, especially for a long time, will not be changed without strong reason.—Rodee v. City of Ogdensburg, 148 N. Y. Supp. 826.

69. **Libel and Slander**—Repetition.—Every repetition of a slander, or the publication thereof by a newspaper, is a re-publication, rendering each person so repeating or republishing

liable, as well as the initial one.—Age-Herald Pub. Co. v. Waterman, Ala., 66 So. 16.

70. **Master and Servant**—Assumption of Risk.—Under the Federal Employers' Liability Act, a servant does not assume the risk of injuries occasioned by the master's negligence.—Thornton v. Seaboard Air Line Ry., S. C. 82 S. E. 433.

71.——Contributory Negligence.—The provision of the Federal Employers' Liability Act that railroad employes shall not be considered guilty of contributory negligence where the railroad's violation of any statute enacted for the safety of employes contributes to an injury, applies only to violations of Federal statutes.—Gee v. Lehigh Valley R. Co., 148 N. Y. Supp. 882.

72.——Intentional Injury.—Where acts were committed by servants while in the work they were employed to do and to expedite the work, the master was liable for injuries caused thereby, though the acts of the servants were willful and intentional. —Pesola v. Forsten, Mich., 148 N. W. 365.

73. **Mortgages**—Coupon Notes.—Where interest coupon notes, evidencing the interest to become due on a note secured by a deed of trust, are negotiable, they possess, when detached from the note, the qualities of commercial paper, and when negotiated they carry with them the security of the deed of trust pro tanto.—Wing v. Union Cent. Life Ins. Co., Mo., 168 S. W. 917.

74.——Foreclosure. — Where a mortgagee after an irregular foreclosure under a power of sale at which he becomes the purchaser, sells the land at a profit to an innocent purchaser, the mortgagor or his heirs may hold the mortgagee as a trustee, and recover any profit above the mortgage debt.—Fountain v. Pateman, Ala., 66 So. 75.

75. **Nuisance**—Private Nuisance.—For defendant to sink storage tanks on the extreme edge of its property and within a few feet of complainant's residence, in which over 20,000 gallons of gasoline were to be stored, constitutes a private nuisance, in view of the dangerous character of gasoline and the liability to explosion.—Whittemore v. Baxter Laundry Co., Mich., 148 N. W. 437.

76. **Patents**—License.—A covenant by a licensor under a patent to assert its rights to protect the patent is an independent covenant, and the damages from a breach thereof are recoverable by the licensee only by separate action or by a counterclaim in an action by the licensor for royalties.—Watson Fireproof Window Co. v. Henry Weis Cornice Co., Mo., 168 S. W. 905.

77. **Perpetuities**—Express Trust.—A suspension of the absolute power of alienation resulting in an unlawful perpetuity can be created only by an express trust or power in trust or by a contingent limitation.—In re Kalter's Will, 148 N. Y. Supp. 921.

78. **Principal and Agent**—Personal Liability. —An agent, though known to be such, when dealing in his own name without disclosing the name of his principal is personally bound by his contract.—Richards v. Robin, 148 N. Y. Supp. 822.

79.——Special Authority.—An agent to make a contract is not authorized to rescind or vary the rights of his principal, unless special authority thereto is shown.—Maybank & Co. v. Rogers, S. C., 82 S. E. 422.

80.——Release of Surety.—Changes in the specifications for work to be done by a contractor in straightening a river channel, which were minor in character, and neither added to the expense nor delayed the work, did not release the surety on the contractor's bond from liability.—Bankers' Surety Co. v. Elkhorn River Drainage Dist., U. S. C. C. A., 214 Fed. 342.

81.——Release of Surety.—Where the principal on a note payable to a bank has money on deposit in the bank after maturity more than sufficient to pay it, the bank's failure to apply it to the note will not discharge the surety. —Solomon v. Merchants' & Planters' Nat. Bank, Tex., 168 S. W. 1029.

82. **Sales**—Implied Warranty.—Under an implied warranty that mules bought were free from contagious disease, the buyer could recover the expense of treating mules affected with glanders and for maintaining them in quarantine, but not the expense of keeping his labor in shape to continue his business until the spread of the disease among his mules was stopped, which was not the direct result of buying the diseased mules.—Sandlin v. Wilder, Ga., 82 S. E. 440.

83.——Opinion.—A statement by a salesman that hogs in cars were free from disease, made to a prospective buyer taken to where the hogs were, was not an expression of opinion, but representations of acts, and the buyer could rely thereon.—George W. Saunders Live Stock Commission Co. v. Kincaid, Tex., 168 S. W. 977.

84.——Rescission.—While misrepresentations as to quality inducing the purchaser to pay an excessive price may afford ground for a rescission or recovery of damages, it will not authorize an abatement of the purchase price on the ground of partial failure of consideration. —Couch v. Crane, Ga., 82 S. E. 459.

85. **Specific Performance**—Laches.—A vendee in possession is not barred from suing for specific performance by delay in bringing his action; his possession being the continuous assertion of his claim.—Hargis v. Ederington, Ark., 168 S. W. 1095.

86. **Theaters and Shows**—Reasonable Care.— An owner maintaining for profit a baseball park for professional baseball games must exercise reasonable care to protect its patrons from foul balls, and, where it screens its grandstand, it must exercise reasonable care to keep the screen free from defects.—Edling v. Kansas City Baseball & Exhibition Co., Mo., 168 S. W. 908.

87. **Torts**—Contract Relations.—A wrongful interference with the contract relations of others, causing a breach, is a tort.—Twitchell v. Nelson, Minn., 148 N. W. 451.

88. **Trusts**—Constructive Trust.—Where the managing officer of a corporation which operated a large mill, requiring an abundant supply of water, acquired personally land necessary for the water power, and created a reservoir thereon, and conducted the water to the mill, a constructive trust arises because of the relations between the officer and the corporation, which will prevent the officer from denying the right of the corporation to take water. —Profile Cotton Mills v. Calhoun Water Co., Ala., 66 So. 50.

89. **Vendor and Purchaser**—Notice.—Where a grantor, who owned only an undivided one-half interest in a section, conveyed through mistake his entire interest to another instead of a one-fourth interest, as was intended, the record of a subsequent deed by the grantor to a second grantee of the remaining one-fourth interest is not constructive notice to creditors of the first grantee.—Cetti v. Wilson, Tex., 168 S. W. 996.

90. **Wills**—Attestation.—Where a testatrix did not inform one of the two attesting witnesses that the instrument which he attested was a will, there is no sufficient compliance with the statute of wills.—In re Bryant's Estate, 148 N. Y. Supp. 917.

91.——Construction.—Where provisions of a will are in conflict, the last provision is controlling.—Little v. McGuire, Ark., 168 S. W. 1084.

92.——Devise in Fee.—A devise of the net income to be derived from an undivided half of certain real estate to an orphange, without limitation as to time, constituted a devise of the fee of one-half of the property.—Scruggs v. Yancey, Ala., 66 So. 23.

93.——Devise of Fee.—A devise to testator's wife for life and at her death in equal shares to two daughters if both survive the wife, and, if not, to the survivor of the two, with gift over if neither survive, vests a fee title to a half interest in a daughter subject to the life estate, with the possibility of the title being defeated on her death before that of the wife.—Ensign v. Dunn, Mich., 148 N. W. 343.